

108 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER04-779-000
ER04-779-001

ORDER ACCEPTING FOR FILING AND SUSPENDING
AMENDMENT, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued August 20, 2004)

Introduction

1. The Midwest Independent Transmission System Operator, Inc. (Midwest ISO), certain of the Midwest ISO transmission owners, including certain of the Midwest Stand Alone Transmission Companies¹ (the Midwest ISO Transmission Owners²), and

¹ American Transmission Co. LLC and Michigan Electric Transmission Co., LLC.

² For purposes of this filing, the Midwest ISO Transmission Owners are: Central Illinois Light Co. d/b/a AmerenCilco; Alliant Energy Corporate Services, Inc. on behalf of its operating company affiliate Interstate Power and Light Co. (f/k/a IES Utilities Inc. and Interstate Power Co.); American Transmission Co. LLC; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); Cinergy Services, Inc. (for Cincinnati Gas & Electric Co., PSI Energy, Inc., and Union Light Heat & Power Co.); City Water, Light & Power (Springfield, IL); Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Co.; LG&E Energy Corp. (for Louisville Gas and Electric Co. and Kentucky Utilities Co.); Lincoln Electric System; Michigan Electric Transmission Co., LLC; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin), subsidiaries of Xcel Energy Inc.; Otter Tail Corporation d/b/a Otter Tail Power Co.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Co. (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

GridAmerica LLC (GridAmerica) and the GridAmerica Companies³ (collectively, Applicants) jointly filed proposed revisions to the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc. (Midwest ISO Agreement) to implement the distribution to the GridAmerica Companies of revenues from the Regional Through and Out Rate (RTOR) collected under Schedule 14 of the Midwest ISO Open Access Transmission Tariff (Midwest ISO OATT).

2. In this order, we accept the proposed revisions to the Midwest ISO Agreement for filing, suspend them, and establish hearing and settlement judge procedures. This order benefits customers by providing a forum for the resolution of the issues between the parties.

Background

3. On January 31, 2002, the Commission accepted a filing made by the Midwest ISO and the Midwest ISO transmission owners containing a new Schedule 14 rate adder and a mechanism for distributing the revenues collected under this new adder. The Schedule 14 rate adder is applied to transmission service through and out of the Midwest ISO transmission system and allows for recovery of a portion of revenues lost by the transmission owners due to the elimination of rate pancaking. The revenues were to be distributed to the Midwest ISO transmission owners, with 50 percent based on the relative flows on transmission owners' systems and 50 percent based on each transmission owner's relative share of total lost revenues, as contained in Appendix C-3 of the Midwest ISO Agreement.⁴

4. On April 29, 2004, as amended on April 30, 2004,⁵ Applicants filed the proposed revisions to the Midwest ISO Agreement at issue here, in order to include the newly joined GridAmerica Companies in the distribution of Schedule 14 rate adder revenues allocated on the basis of relative share of total lost revenues.

³ The GridAmerica Companies are: Ameren Services Co. on behalf of its public utility affiliates Union Electric Co. d/b/a AmerenUE and Central Illinois Public Service Co. d/b/a AmerenCPS (Ameren); American Transmission Systems Incorporated (ATSI), a subsidiary of FirstEnergy Corp., and Northern Indiana Public Service Co. (NIPSCO).

⁴ Midwest Independent Transmission System Operator, Inc., 98 FERC ¶ 61,076 (2002).

⁵ Applicants corrected an error in an exhibit included in the April 29, 2004 filing.

5. On June 15, 2004, the Director, Division of Tariffs and Market Development-Central, issued a letter informing Applicants that their April 29, 2004 filing was deficient. On June 22, 2004, Applicants filed a response to the deficiency letter.

Notices of Filings and Responsive Pleadings

6. Notice of Applicants' April 29, 2004 filing was published in the *Federal Register*,⁶ with interventions and protests due on or before May 20, 2004. Timely motions to intervene and protests were filed by International Transmission Company (International Transmission) and Detroit Edison Company (Detroit Edison).

7. Timely motions to intervene, raising no substantive issues, were filed by the Department of Municipal Services of Wyandotte, Michigan, and Consumers Energy Company.

8. On May 21, 2004, Wisconsin Electric Power Company (WEPCO) filed a motion to intervene out-of-time, raising no substantive issues.

9. On June 4, 2004, the GridAmerica Companies filed an answer to the protests. On June 7, 2004, the Midwest ISO Transmission Owners filed an answer to the protests and a motion to accept their answer out of time.

10. Notice of Applicants' June 22, 2004 filing was published in the *Federal Register*,⁷ with interventions and protests due on or before July 13, 2004. Timely comments were filed by Detroit Edison and WEPCO.

Discussion

A. Procedural Matters

11. Since WEPCO filed its motion to intervene prior to the due date established for interventions in the notice of filing of the June 22, 2004 filing, WEPCO's motion to intervene is timely.⁸ Pursuant to Rule 214 of the Commission's Rules of Practice and

⁶ 69 Fed. Reg. 26,588 (2004).

⁷ 69 Fed. Reg. 40,894 (2004).

⁸ See, e.g., ISO New England, Inc., 103 FERC ¶ 61,320 at P 11 & n.9 (2003).

Procedure,⁹ the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protests unless otherwise ordered by the decisional authority.¹⁰ We will accept the GridAmerica Companies' and the Midwest ISO Transmission Owners' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

13. Applicants state that the proposed revisions would allow the GridAmerica Companies to take part in the distribution of Schedule 14 rate adder revenues. These revenues are collected by the Midwest ISO and are distributed to transmission owners according to two distribution factors: (1) 50 percent based on each transmission owner's relative share of total lost revenues; and (2) 50 percent based on the relative flows on each transmission owner's system for through and out service. Applicants state that the proposed revisions do not modify the Schedule 14 rate adder; rather, they change the revenue distribution factors to reflect the addition of the GridAmerica Companies to this distribution. Applicants request waiver of the 60-day prior notice requirement to allow an effective date of October 1, 2003, to reflect the addition of NIPSCO and ATSI, and an effective date of May 1, 2004, to reflect the addition of Ameren. As discussed below, the protests: (1) oppose the requested October 1, 2003 effective date for the distribution of revenues to the GridAmerica Companies; (2) allege that the proposed changes would constitute prohibited retroactive ratemaking and violate the filed rate doctrine; and (3) raise other issues concerning the support proffered by Applicants for the proposed revisions.

1. Waiver of the Prior Notice Requirement

14. International Transmission and Detroit Edison oppose waiver of the prior notice requirement to permit an October 1, 2003 effective date for the distribution of revenues to the GridAmerica Companies.¹¹ They contend that Applicants failed to provide advance notice of this proposed change and have provided no explanation for why no filing was

⁹ 18 C.F.R. § 385.214 (2004).

¹⁰ 18 C.F.R. § 385.213(a)(2) (2004).

¹¹ No party opposes the requested effective date of May 1, 2004 for the revenue distributions to Ameren.

made in advance of October 1, 2003, when those companies commenced operation within the Midwest ISO.

15. In addition, International Transmission and Detroit Edison protest that the proposed revisions would have a disproportionate and unduly discriminatory impact on International Transmission.¹² International Transmission notes that its relative share of Schedule 14 revenue for the past period would fall from 3.9 percent to 1.2 percent. Detroit Edison claims that such changes could result in rate increases for International Transmission's customers, such as itself.

16. The Grid America Companies respond that denial of the requested October 1, 2003 effective date to coincide with the expansion of the Midwest ISO footprint to include the GridAmerica Companies would result in unwarranted windfall profits to International Transmission and Detroit Edison, which would be inequitable, unjust and unreasonable. In their answer, the GridAmerica Companies explain that the proposed filing is the result of negotiations among the Midwest ISO transmission owners. The GridAmerica Companies state that after ATSI and NIPSCO were integrated into the Midwest ISO they noticed that they were not receiving a portion of the Schedule 14 rate adder revenues allocated on the basis of lost revenues. At this point, according to the GridAmerica Companies, they commenced negotiations with the Midwest ISO and the transmission owners. The GridAmerica Companies state the Midwest ISO believed that, in order to receive Schedule 14 rate adder revenues, the GridAmerica Companies would have to be included on Attachment 1 to Appendix C-3 of the Midwest ISO Agreement, which contains distribution factors for the portion of Schedule 14 rate adder revenues allocated on the basis of relative share of total lost revenues.

17. The GridAmerica Companies believe they are entitled to their portion of Schedule 14 rate adder revenues from the time of their integration into Midwest ISO regardless of whether they are listed on the attachment. However, they state that they entered into negotiations to develop the instant filing and all of the Midwest ISO transmission owners agreed on the proposal except for International Transmission. The GridAmerica Companies assert that the April 29, 2004 filing is an integrated whole and that the Commission should not accept portions of the negotiated compromise regarding the

¹² International Transmission does not dispute that allocation factors must be equitably adjusted to reflect that the GridAmerica Companies have joined the Midwest ISO. However, International Transmission opposes making Applicants' filing effective retroactively.

allocation of Schedule 14 rate adder revenue and reject others. They also note that, as a point of compromise, they have agreed to forfeit any interest on their portion of the Schedule 14 rate adder revenues.

Commission Determination

18. Consistent with *Central Hudson Gas & Electric Corp.*,¹³ which provides that waiver of the 60-day prior notice requirement will generally be appropriate when a change in rates is prescribed by an agreement on file with the Commission, we find good cause to grant Applicants' request for waiver. Here, as explained further below, the filing at issue is provided for by section 16.1 of the Appendix I Agreement.¹⁴ We also are aware that the filing at hand constitutes an amendment to the Midwest ISO Agreement, which is not a light undertaking, requiring a unanimous vote by the Midwest ISO transmission owners.¹⁵ We further note that the proposed filing is the outcome of a negotiated agreement supported by all of the Midwest ISO transmission owners except one, and we agree that the GridAmerica Companies are entitled to an equitable portion of the Schedule 14 rate adder revenues distributed on the basis of their relative share of total lost revenues. Finally, in this regard, while International Transmission seeks to keep the Schedule 14 rate adder revenues that should have gone to GridAmerica and thus treat GridAmerica as if it had not joined the Midwest ISO, International Transmission does not correspondingly offer to return any benefits (such as additional Schedule 7 and 8 revenues) that it received as a result of GridAmerica joining the Midwest ISO.

¹³ 60 FERC ¶ 61,106 at 61,337, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

¹⁴ Section 16.1 provides as follows:

On and after the Control Date, Midwest ISO shall have with respect to its relationship with GridAmerica, and performance of RTO Services contemplated by this Agreement, all those responsibilities to GridAmerica, which Midwest ISO has to other ITC within Midwest ISO, as well as all other obligations of Midwest ISO set forth in Article Three, Sections III and IV of the Midwest ISO Agreement.

¹⁵ Article 11, Section IX of the Midwest ISO Agreement ("The distribution of transmission service revenues collected by the Midwest ISO and the methodology for determining such distribution, as set forth in Appendix C to this Agreement, and the return of start-up costs, provided for in Appendix C to this Agreement, also shall not be changed except by unanimous vote of the owners.")

19. We are not convinced that redistribution of the Schedule 14 rate adder revenues for service taken since ATSI and NIPSCO joined Midwest ISO would result in undue harm to International Transmission. In fact, it seems evident that the benefits International Transmission receives by way of increased Schedule 7 and 8 revenues due to GridAmerica's integration will outweigh any arguable harm it may incur because of the reallocation of already-distributed Schedule 14 rate adder revenues. We note, that according to data submitted by Applicants in the June 22 amendment, International Transmission's portion of Schedules 7 and 8 revenues for the seven-month period from October 2002 to April 2003, before integration of ATSI and NIPSCO, was \$3,671,696. The revenue distribution for the seven-month period beginning October 1, 2003, after integration of ATSI and NIPSCO, was \$4,268,345, a difference of \$596,649. We contrast this with International Transmission's "loss" due to redistribution of Schedule 14 rate adder revenues for the past period, which is \$331,048. Accordingly, it appears that International Transmission remains a significant net beneficiary as a result of increased transmission service from the incorporation of ATSI and NIPSCO into Midwest ISO on October 1, 2003, even if International Transmission is required to return portions of the Schedule 14 rate adder revenue that has already been distributed.¹⁶

2. Retroactive Ratemaking and Filed Rate Doctrine

20. Detroit Edison and International Transmission argue that the proposed retroactive effective date violates the rule against retroactive ratemaking and the filed rate doctrine. Detroit Edison asserts that lowering International Transmission's share of Schedule 14 rate adder revenues would, in turn, lower the revenue credit in International Transmission's rates to its customers such as Detroit Edison, resulting in an effective rate increase for Detroit Edison and other transmission customers in future years. International Transmission characterizes the distribution factors contained in Appendix C-3 to the Midwest ISO Agreement as the "filed rate". It asserts that the proposal would retroactively reduce the revenues that it was entitled to under those distribution factors. Although International Transmission does not contest the GridAmerica Companies' inclusion in the Schedule 14 rate adder revenue distribution prospectively, it contends that doing so retroactively violates the filed rate doctrine.

21. The GridAmerica Companies respond that the filing does not violate the prohibition against retroactive ratemaking or the filed rate doctrine because the proposal

¹⁶ See generally *Midwest ISO Transmission Owners v. FERC*, Nos. 02-1121, *et al.*, slip op. at 11-16 (D.C. Cir. July 16, 2004) (affirming allocation of costs to all who benefit from the ISO's operation of the grid, even if matching of costs to benefits is not precise and some of those responsible for the costs do not actually use the system).

does not seek to change the Schedule 14 rate adder, but merely changes the distribution of revenues associated with that rate. Thus, they contend that the Applicants' proposal does not run afoul of the prohibition against retroactive ratemaking or the filed rate doctrine merely because it may, at some point, affect the calculation of transmission charges determined pursuant to a filed rate. Instead, they assert that the formulaic nature of the Midwest ISO's Attachment O rate provides sufficient notice to ratepayers. In support, they cite a District of Columbia Circuit decision which stated, "this court has rejected the notion that charges assessed pursuant to a formula rate violate the filed rate doctrine; rather, the formula itself is the filed rate that provides sufficient notice to ratepayers for purposes of this doctrine."¹⁷ Finally, the GridAmerica Companies submit that International Transmission and Detroit Edison were on notice that, upon the integration of the GridAmerica Companies into the Midwest ISO, the GridAmerica Companies would be entitled to an equitable allocation of Schedule 14 rate adder revenues and that the existing allocations among the Midwest ISO transmission owners would be revised accordingly.

Commission Determination

22. We are not convinced that the proposed filing constitutes retroactive ratemaking or that it violates the related filed rate doctrine. As the courts have held, the rule against retroactive ratemaking does not extend to cases in which customers are on notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.¹⁸ We agree with the GridAmerica Companies that International Transmission and its customers, including Detroit Edison, had notice that the GridAmerica Companies were entitled to a share of Schedule 14 rate adder revenues prior to Applicants' filing in this proceeding. Section 16.1 of the Appendix I Agreement, ultimately approved in the proceeding involving the integration of GridAmerica into the Midwest ISO, guarantees GridAmerica the same relationship with the Midwest ISO that other independent transmission companies, including International Transmission, have

¹⁷ See GridAmerica Companies Answer at 11, *citing* Public Utilities Commission of the State of California v. FERC, 254 F.3d 250, 254 n.3 (D.C. Cir. 2001) (*CPUC v. FERC*).

¹⁸ See, e.g., Consolidated Edison Co. of New York v. FERC, 347 F.3d 964, 968-70 (D.C. Cir. 2003).

with the Midwest ISO.¹⁹ Indeed, International Transmission's own entitlement to a share of Schedule 14 rate adder revenues constitutes adequate notice that the GridAmerica Companies likewise were entitled to a share of Schedule 14 rate adder revenues. In fact, International Transmission acknowledges that the distribution factors in the Midwest ISO Agreement must be equitably adjusted to reflect that the GridAmerica Companies have joined the Midwest ISO, albeit they seek to do so only prospectively. Thus, International Transmission and Detroit Edison had adequate notice that the integration of the GridAmerica Companies into the Midwest ISO would entitle the GridAmerica Companies to be included in the distribution of Schedule 14 rate adder revenues. Because they had adequate notice, the instant filing does not constitute retroactive ratemaking or violate the filed rate doctrine.

23. Detroit Edison claims that requiring International Transmission to return Schedule 14 rate adder revenues already distributed could result in an effective rate increase to customers in International Transmission's rate zone, since those distributions were passed through to such customers as revenue credits pursuant to International Transmission's Attachment O formula rate. However, we note that any return of Schedule 14 rate adder revenues and any resulting rate effect would be the result of changes in inputs to a formula rate, rather than changes to the formula rate itself, and thus, would not constitute a change to the filed rate. As noted by the GridAmerica Companies in their answer, citing *CPUC v. FERC*, changes in inputs to a formula rate do not constitute retroactive ratemaking because the formula itself, as opposed to the inputs, is the filed rate, and the formula has not changed.²⁰

3. Other Issues

24. In their comments on the Applicants' June 22 amendment, Detroit Edison and WEPCO contend that Applicants' proposal uses lost revenue information gathered from other proceedings that resulted in settlements. They raise concerns about modifying revenue distributions based on data taken from a settled proceeding where such data was

¹⁹ We note that both Detroit Edison and International Transmission filed motions for intervention and substantive pleadings in Docket No. ER02-2233-000, the proceeding involving the Appendix I Agreement which establishes GridAmerica as an independent transmission company within Midwest ISO.

²⁰ See also *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at P 591 (2004); *New PJM Companies*, 108 FERC ¶ 61,140 at P 26 & n.27 (2004).

not subjected to a complete and thorough analysis and subsequent Commission action. They argue that it remains unclear whether, and to what extent, Applicants are relying on such data in the instant filing.

25. Although we agree with Applicants that the GridAmerica Companies are entitled to a share of the Schedule 14 rate adder revenues based on the share of total lost revenues, we cannot verify the proposed distribution factors based on the evidence in the record. The proposed distribution factors are based on lost revenue amounts gathered in the course of a settled proceeding.²¹ Although this settlement was approved by the Commission, it only contained “black-box” rates and settlement amounts and not the underlying lost revenue amounts used to determine those rates. We therefore find that the instant filing raises material issues of fact that are best resolved in the hearing and settlement judge proceedings ordered below.

26. We further note that much of the contention in this proceeding is the result of several months delay in making a filing to include NIPSO and ATSI in the revenue distribution. In the future, the Midwest ISO, the Midwest ISO transmission owners, and new RTO entrants should diligently address such issues and file necessary tariff modifications in a more timely manner.

4. Conclusion and Establishment of Hearing and Settlement Judge Procedures

27. We find that the parties have raised issues of material fact concerning the proposed modifications to the Midwest ISO Agreement that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

28. Our preliminary analysis indicates that the proposed revisions to the Midwest ISO Agreement have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept and suspend the proposed revisions for a nominal period, to become effective subject to refund, as ordered below, and set them for hearing and settlement judge procedures as ordered below. As discussed above, we find good cause to grant waiver of the 60-day prior notice requirement with respect to the proposed revisions to reflect inclusion of NIPSCO and ATSI in the Midwest ISO effective October 1, 2003. With respect to the proposed revisions to reflect inclusion of Ameren in the Midwest

²¹ See Applicants’ June 22, 2004 Deficiency Response at 4-5 (citing the proceeding in Docket No. ER03-580).

ISO, Applicants request an effective date of May 1, 2004, the date Ameren was expected to commence operation as part of GridAmerica under the Midwest ISO. Ameren, in fact, commenced operation as part of GridAmerica under the Midwest ISO on that date, and Applicants' request for waiver of the prior notice requirement with respect to Ameren is unopposed. Accordingly, we will grant waiver of the 60-day prior notice requirement and accept the proposed revisions to reflect inclusion of Ameren in the Midwest ISO effective May 1, 2004.

29. Although we are setting this proceeding for a trial-type evidentiary hearing, we encourage the parties to attempt to negotiate a mutually-acceptable agreement that will resolve the matters at issue. Accordingly, to aid the parties in their efforts at settlement, we will hold the evidentiary hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding. Otherwise, the Chief Judge will select a settlement judge.²³ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Applicants' proposed revisions to the Midwest ISO Agreement to reflect the distribution of Schedule 14 rate adder revenues to ATSI and NIPSCO are hereby accepted for filing and suspended, to become effective on October 1, 2003, subject to refund, as discussed in the body of this order. Applicants' proposed revisions to the Midwest ISO Agreement to reflect the distribution of Schedule 14 rate adder revenues to Ameren are hereby accepted for filing and suspended, to become effective on May 1, 2004, subject to refund, as discussed in the body of this order.

²² 18 C.F.R. § 385.603 (2004).

²³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a listing of Commission judges and a summary of their background and experience (www.ferc.gov click on Office of Administrative Law Judges).

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Applicants' lost revenue data and proposed revenue distributions, as discussed *supra* P 24-25 in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within 60 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen (15) days of the date of the presiding judge's designation, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER04-779-000
EL04-779-001

(August 20, 2004)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I write separately to express my views on the Commission's decision to accept a retroactive effective date for the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) proposed revision to the distribution of transmission service revenues under Schedule 14 of the Midwest ISO OATT.

I agree that the GridAmerica Companies should share in the distribution of Schedule 14 adder revenues allocated on the basis of relative share of total lost revenues. I disagree that they should share in these revenues as of October 1, 2003, and disagree that the Commission can revise the Midwest ISO Agreement, a filed rate schedule, to allow them to share in these revenues retroactively.

GridAmerica became a member of Midwest ISO on October 1, 2003. It was only after that point that GridAmerica realized an amendment to the Midwest ISO Agreement was necessary for them to share in Schedule 14 adder revenues allocated on the basis of relative share of total lost revenues.²⁴ GridAmerica commenced negotiations with the Midwest ISO and the Midwest ISO Transmission Owners, and the Midwest ISO filed the proposed revisions considered in this order.

The crux of the issue is that GridAmerica apparently misread the Midwest ISO Agreement. Otherwise, it presumably would have made a timely filing, and there would

²⁴ Order at P 16 ("The GridAmerica Companies state that after ATSI and NIPSCO were integrated into the Midwest ISO they noticed that they were not receiving a portion of the Schedule 14 rate adder revenues allocated on the basis of lost revenues.").

be no need for the Commission to consider the merits of setting a retroactive effective date.²⁵ The Commission appears to be setting a retroactive effective date in order to protect GridAmerica from the consequences of its own mistake. I think the better course would be to approve the application without waiving the 60-day prior notice requirement.

Joseph T. Kelliher

²⁵ *Id.* at P 26 (“We further note that much of the contention in this proceeding is the result of several months delay in making a filing to include NIPSCO and ATSI in the revenue distribution. In the future, the Midwest ISO, the Midwest ISO transmission owners, and new RTO entrants should diligently address such issues and file necessary tariff modifications in a more timely manner.”).